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## Civil Liability of Court-Appointed Experts in German Law

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**Abstract:** This article highlights some distinct features of the German rules on the liability of court-appointed experts. It lays out the origins, developments and discussions of German practice and literature in this area resulting in the enactment of the statutory rule on the liability of court appointed experts in section 839a BGB as an action in tort. Further requirements of such liability, including the standard of care expected from the expert and the limits of possible compensation for losses caused by an erroneous opinion are discussed.

### 1. Introduction

In today's modern society, we have accepted that striving for increasing professional specialization of each individual is necessary in order to ensure the current and future well being of society.<sup>1</sup> Clearly, judges are unable to keep up with the pace of such specialization and hence are bound to rely on 'externalized' knowledge, which in most cases is provided by court-appointed experts. With the vast technological development over the last century, the work of such experts has gained importance as judges have increasingly relied on their findings. Accordingly, if such a court-appointed expert delivers an erroneous opinion on which the judgment of the court is based, the judgment will equally be flawed as it would not represent the true factual and, accordingly, legal position.<sup>2</sup> As this may very well result in harm to (usually) one party to the case, the German legislator decided to take action in 2002 and make court-appointed experts liable for harm resulting from false expert opinions by introducing a new action for such liability in section 839a *Bürgerliches Gesetzbuch* (BGB) (Civil Code).

Any individual with above-average scientific, technical, or professional expertise can be nominated as an expert by the court.<sup>3</sup> There is no specialized

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1 See A. SMITH, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 5th edn, Methuen & Co, London 1904, pp. 19 *et seq.* (pin maker), available online <<http://www.econlib.org/library/Smith/smWNCover.html>> (9 Jul. 2013).

2 German procedural law represents (to a limited extent in civil procedure) an inquisitorial system (as opposed to an adversarial system used in common law countries); that is, the court is asked to actively investigate the true facts of the case.

3 BGH (*Bundesgerichtshof* (Federal Court of Justice)) 23 May 1984, *NJW* (*Neue Juristische Wochenschrift*) 1984, p. 2365 at 2366; P. BLEUTGE, 'Die Hilfskräfte des Sachverständigen -

training for experts and no specific personal education that results in a professional life as an expert in court. The only condition is – as section 839a BGB clearly sets out – appointment by the court.<sup>4</sup> It is for the judge to decide<sup>5</sup> who constitutes a specialist to support the exercise of the court's functions (*Gehilfe des Gerichts*).<sup>6</sup> In civil proceedings, such a specialist is typically appointed in the form of an evidence order<sup>7</sup> or any other order;<sup>8</sup> in criminal proceedings, a simplified evidence order of the chief judge suffices.<sup>9</sup>

It is well established that four different means of such assistance to the judge exist. Firstly, the appointed expert may present abstract-theoretical observations in his area of expertise with no reference to the facts of the case; it is the judge who then has to apply these to the facts of the case (*Vermittlung von Erfahrungssätzen und Regeln*). In the majority of cases, however, the appointed expert will apply his knowledge to the case at hand and will submit his conclusions and how he arrived at these conclusions to the judge (*Beurteilung von Tatsachen*).<sup>10</sup> The court's mandate could also include the investigation and,

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Mitarbeiter ohne Verantwortung?', *NJW* 1985, p. 1185 at 1187; H. BREMER, *Der Sachverständige*, 2nd edn, Recht und Wirtschaft, Heidelberg 1973, p. 21; A. HEGLER, 'Die Unterscheidung des Sachverständigen vom Zeugen im Prozeß', 104 *AcP* (*Archiv für die civilistische Praxis*) 1909, p. 151 at 153; M. STAHL, *Zur Dritthaftung von Rechtsanwälten, Steuerberatern, Wirtschaftsprüfern und öffentlich bestellten und vereidigten Sachverständigen*, Peter Lang, Frankfurt am Main 1989, p. 31; C. THOLE, *Die Haftung des gerichtlichen Sachverständigen nach § 839a BGB*, Carl Heymanns, Köln/Berlin/München 2004, p. 3; MünchKommBGB/G. WAGNER, *sec. 839a BGB*, 5th edn, Beck, München 2009, No. 6 *et seq.*; Staudinger/M. WURM, *sec. 839a BGB*, Sellier/de Gruyter, Berlin/Boston 2007, No. 1.

- 4 Opinions by all other private or public experts (especially those nominated by a party (*Parteigutachten*)) represent substantiated submissions and are thus excluded from liability even in cases where both parties subsequently agree on the correctness of the opinion submitted. BGH 27 May 1982, *NJW* 1982, p. 2874 at 2875; BGH 10 Oct. 2000, *NJW* 2001, p. 77 at 78; C. THOLE (n. 3), p. 3; MünchKommZPO/W. ZIMMERMANN, *sec. 402 ZPO*, 3rd edn, Beck, München 2008, No. 9.
- 5 See sec. 404, para. 1 *Zivilprozessordnung* (ZPO) (Code of Civil Procedure), available online <[http://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html)> (9 Jul. 2013).
- 6 BVerfG (*Bundesverfassungsgericht* (Federal Constitutional Court)) 5 May 1987, *NJW* 1987, p. 2500 at 2501; BGH 19 Nov. 1964, *NJW* 1965, p. 298 at 299 = BGHZ (*Bundesgerichtshofentscheidungen in Zivilsachen*) 62, p. 54 at 59; BGH 31 Jan. 1968, *NJW* 1968, p. 787 at 788; MünchKommZPO/W. ZIMMERMANN, *sec. 402 ZPO*, No. 2.
- 7 See secs 358 *et seq.* ZPO.
- 8 M. HUBER, '§ 404 ZPO', in H.-J. Musielak (ed.), *Zivilprozessordnung*, 9th edn, Franz Vahlen, München 2012, No. 1; MünchKommZPO/W. ZIMMERMANN, *sec. 402 ZPO*, No. 5.
- 9 Compare sec. 238, para. 1 StPO (*Strafprozessordnung*, Code of Criminal Procedure); BGH 3 Jun. 1982, *NStZ* (*Neue Zeitschrift für Strafrecht*) 1982, p. 432; J. EICKMEIER, *Die Haftung des gerichtlichen Sachverständigen für Vermögensschäden*, Carl Heymanns, Köln/Berlin/München 1993, pp. 29 *et seq.*
- 10 BVerfG 11 Oct. 1994, *NJW* 1995, p. 40 at 41 = BVerfGE (*Entscheidungen des Bundesverfassungsgerichts*) 91, p. 176; BGH 18 Oct. 1977, *NJW* 1978, p. 751.

subsequently, the reporting of the relevant facts to the case (*Feststellung von Tatsachen kraft besonderer Sachkunde*).<sup>11</sup> Finally, and very rarely, experts are appointed to render an opinion on foreign or customary law and statutes.<sup>12</sup>

## 2. Compensatory Regime

Historically, the role of court-appointed experts was not regarded as exceptional in comparison to that of other tortfeasors and, accordingly, no specialized rule was provided in the BCB of 1900.<sup>13</sup> As a result, German practice and literature developed the following distinct system to deal with the problem. To begin with, it seems clear that any direct contractual action taken by the parties against the expert will fail as no contract was concluded between them.<sup>14</sup> This extends to actions based on the civilian doctrine of *culpa in contrahendo* as the expert does not provide for the extended confidence of the parties.<sup>15</sup> One could argue, however, that the obligations between the court and the expert also extend to a considerable degree to the parties and thus an action could be based on such a contract to the benefit of a third party (*Vertrag mit Schutzwirkung zugunsten Dritter*). German courts have always rejected<sup>16</sup> such an extension of the duties of the expert as the relation between court and expert (*öffentlich-rechtliche Sonderbeziehung sui generis*) was, in their view, intended only as being subject to the court order but not other remedies provided in civil law.

As the role of the expert was highlighted by the court, one could infer that the expert was so close to the state that his misfeasance ought to come under the heading of state liability (sec. 839 BCB, Art. 34 *Grundgesetz* (GG) (German Constitution)): it is good law that this action is not limited to public officers but includes all persons performing a public duty (*haftungsrechtlicher Beamtenbegriff*).<sup>17</sup> Nevertheless, the *Bundesgerichtshof* (BGH) (Federal Court of

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11 M. HUBER, 'sec. 404 ZPO', in H.-J. Musielak (ed.), *Zivilprozessordnung* (n. 8), No. 1.

12 See sec. 293 ZPO; BGH 30 Mar. 1976, *NJW* 1976, p. 1581 at 1583; E. SCHILKEN, 'Zur Rechtsnatur der Ermittlung ausländischen Rechts nach § 293 ZPO', in Festschrift Schumann, Mohr Siebeck, Tübingen 2001, pp. 373 *et seq.*

13 For an in-depth assessment of the historical starting point and the development in the twentieth century, see H. HONSELL, 'Die Haftung für Gutachten und Auskunft unter besonderer Berücksichtigung von Drittinteressen', in Festschrift Medicus, Carl Heymanns, Köln/Berlin/München 1999, pp. 211 *et seq.*

14 BGH 19 Nov. 1964 (n. 6), p. 315; BGH 5 Oct. 1972, *NJW* 1973, p. 554 = BGHZ 59, p. 310, at 311.

15 Actions for *Parteigutachten* (see n. 4) would be compensated under this heading.

16 See, e.g., BGH 20 May 2003, *NJW* 2003, p. 2825 at 2826, with further reference.

17 BGH 21 Jan. 1993, *BGHZ* 121, p. 161 at 164; BGH 16 Apr. 1964, *BGHZ* 42, p. 176 at 178 = *NJW* 1964, p. 1895 at 1897; OLG (*Oberlandesgericht* (Higher Regional Court)) Hamm, *NJW* 1972, p. 2088; Staudinger/M. WURM, *sec. 839a BGB* (n. 3), No. 37; MünchKommBGB/H.-J. PAPIER, *sec. 839 BGB*, 5th edn, Beck, München 2009, No. 129 *et seq.*, with extensive further reference.

Justice) had previously dismissed such liability and demanded instead a close connection between the harmful action and the public duty<sup>18</sup> to establish liability, that is, the false expert opinion and the expert's role in the court.<sup>19</sup> Regarding the expert's liability, the court held in this regard that the expert is no closer to the court than a witness, for whom no state liability is assumed.<sup>20</sup> Similar to a witness, the expert fulfils his own civic responsibilities with his activities and not official duties of the state and, accordingly, does not act as an official.<sup>21</sup> Accordingly, the state should not be rendered liable when an expert submits a false opinion. As a result, the expert himself will have to bear liability.

In German law, such liability may arise from section 823, paragraph 1 BGB, requiring the violation of one of the enumerated legally protected interests, and notably does not result in any compensation for pure economic loss. As the property or the general right to one's personality may very well be affected, the controversies on the topic focussed on the question of fault on the side of the expert. Opinions have ranged from a complete refusal of any privilege (i.e., the expert is liable for the slightest negligence, *culpa levissima*)<sup>22</sup> to a limitation of the liability to cases of intentional behaviour (*Vorsatz*) promoted by the BGH.<sup>23</sup> The court argued that recourse actions against appointed experts in cases of the slightest of negligence would open the floodgates to an excessive number of subsequent proceedings with the aim of the factual 'withdrawal'<sup>24</sup> of the original decision. In the court's view, the role of the expert as assistant to the court could not result in the imputation of liability for even slight mistakes as he is performing his civic responsibility dutifully.<sup>25</sup> Finally, the BGH feared the future hesitation of potential experts to engage in work for the courts when faced with a potentially far-reaching liability.<sup>26</sup> In the BGH's view, a distinction between gross and slight negligence was too precarious to apply – therefore the liability of experts should be limited to intentional misfeasance only.<sup>27</sup> The latter judgment of the BGH is one of the rather rare cases where the *Bundesverfassungsgericht*

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18 BGH 26 Nov. 1953, *BGHZ* 11, p. 181 at 185; BGH 16 Apr. 1964, *BGHZ* 42, p. 176 at 179 = *NJW* 1964, p. 1895 at 1897; MünchKommBGB/H.-J. PAPIER, *sec. 839 BGB* (n. 17), No. 188.

19 BGH 5 Oct. 1972, *NJW* 1973, p. 554 = *BGHZ* 59, p. 310 at 312.

20 BGH (n. 19), p. 315.

21 *Ibid.*

22 H. ARNDT, 'Die Haftung des gerichtlichen Sachverständigen', *DRiZ (Deutsche Richterzeitung)* 1973, pp. 272 *et seq.*; J. HELLMER, 'Zur Frage der Haftung des gerichtlichen Sachverständigen für unrichtiges Gutachten', *NJW* 1974, pp. 556 *et seq.*; G. WASNER, 'Die Haftung des gerichtlichen Sachverständigen', *NJW* 1986, pp. 119 *et seq.*

23 BGH 18 Dec. 1974, *NJW* 1974, p. 312 = *BGHZ* 62, p. 54 at 56.

24 BGH 19 Nov. 1964, *BGHZ* 42, p. 313 at 318.

25 BGH 31 Jan. 1968, *NJW* 1968, p. 787 at 788; BGH (n. 23), p. 60.

26 BGH (n. 23), p. 60.

27 BGH (n. 23), p. 61.

(BVerfG) (German Supreme Court) used its right to overturn rulings by other courts and annulled the BGH's judgment.<sup>28</sup> In the view of the BVerfG, the harmed party would be deprived of their constitutional rights (Art. 2, para. 2 GG) if no compensation was rendered even in cases of gross negligence (*Grobe Fahrlässigkeit*) of the expert.<sup>29</sup> Thus, liability for gross negligence of the expert became recognized as judge-made part of the law.<sup>30</sup>

A second option for liability exists in section 823, paragraph 2 BGB, imposing an obligation to make amends on anyone who violates a statutory provision intended for the protection of others. The protective provisions potentially violated are those of the German Criminal Code for False Testimony and Perjury, sections 154 and following *Strafgesetzbuch* (StGB) (Penal Code).<sup>31</sup> The *Reichsgericht* (RG) (Supreme Court of the German Reich) held that the purpose of the rules on false testimony and perjury was, *inter alia*, to protect the parties to the proceedings,<sup>32</sup> and thus the expert will be liable under section 823, paragraph 2 BGB if he submitted a false expert opinion intentionally or negligently, under oath. However, such liability appears to have little, if any, relevance today. Firstly, the claimant must prove fault on the side of the expert, a task that is rarely successful.<sup>33</sup> Secondly, the expert must be sworn in, which is almost never the case in civil proceedings and occurs only rarely in criminal proceedings.<sup>34</sup>

As a result, in lieu of an express rule, under the system developed by German practice and literature, appointed experts became liable under section 823, paragraph 1 BGB in all cases of grossly negligent or intentional false opinions resulting in harm for any of the specified interests enumerated in said provision. In cases where these experts were sworn in, they were fully liable in all cases, including those where the expert acted with slight negligence.

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28 BVerfG 11 Oct. 1978, *NJW* 1979, p. 305 = *BVerfGE* 49, p. 304.

29 BVerfG (n. 28), p. 316.

30 The BVerfG split on the question whether the expert should be held liable in cases of slight negligence as well; four of the eight judges argued for a limitation to gross negligence; the other four were arguably striving for consistence and held that any limitation would undermine the victim's position and the current law would provide for a decision of the legislator, which shall not be altered by the judiciary. BVerfG (n. 28), p. 323.

31 See MünchKommBGB/G. WAGNER, *sec. 823 BGB*, 5th edn, Beck, München 2009, No. 269, with extensive further reference.

32 *Reichsgericht* (RG) (Supreme Court of the German Reich) 1 Dec. 1904, *RGZ (Entscheidungen des Reichsgerichts)* 59, p. 236, 237.

33 C. THOLE (n. 3), p. 31. This applies also to the third and final tier of liability under German law, i.e., sec. 826 BGB providing for compensation for all intentionally inflicted damage on another person.

34 *Ibid.*

### 3. Liability According to Section 839a BGB

Confronted with this situation, the German legislator decided to take action and introduce a new action for damages in section 839a BGB. The provision reads as follows:

Liability of court-appointed experts

(1) If an expert appointed by the court intentionally or by gross negligence submits a false expert opinion, then he is liable to make compensation for the damage incurred by a party to the proceedings as a result of a court decision based on this expert opinion.

(2) Section 839 (3) applies with the necessary modifications.<sup>35</sup>

With this provision, that was introduced to the BGB with the Act on the Amendment of the Rules on Compensation of Damage<sup>36</sup> and has been in force since 1 August 2002, the German legislator arguably achieved two legislative goals. Firstly, a legal basis was proposed for all those cases where the grossly negligent false expert opinion did not result in compensation because the harm sustained was pure economic loss. Such expansion of liability is, however, curbed by the required standard of conduct, thus putting experts under oath at a certain advantage. Secondly, for all other experts the prior state of law is now codified.

According to the provision, an opinion must be rendered by an expert appointed by the court. Such experts are all persons designated by the court to provide abstract-theoretical observations, conclusions, or opinions on foreign or customary law and statutes.<sup>37</sup> Clearly, the provision applies to all experts appointed and does not differentiate between criminal and civil procedures or the reason for the appointment. An expert opinion is deemed false when it represents the factual reality incorrectly – or to put it simply: when it is wrong.<sup>38</sup> In a next step, this incorrect opinion must have been rendered by the expert intentionally or with gross negligence. Such fault must not be connected to the occurrence of harm but only to the (possibly poor) opinion.<sup>39</sup> Intentional fault is present when the expert renders the opinion incorrectly, knowing and wanting to render such

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35 Langenscheidt Translation, available online <[http://www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html)> (9 Jul. 2013).

36 *Zweites Gesetz zur Änderung schadensersatzrechtlicher Vorschriften*, BGBl. (Bundesgesetzblatt (Federal Law Gazette)) I 2002, pp. 2674 *et seq.*, available online <<http://www.bundesanzeiger-verlag.de/evidenzzentrale/>> (9 Jul. 2013).

37 See *supra* n. 10 *et seq.*

38 Compare Explanatory Memorandum of the Federal Government, BT-Drucks. (Bundestagsdrucksache, Official Records of the Parliament) 14/7752, pp. 27 *et seq.*

39 For the parallel question in sec. 823, para. 2, 839 BGB, see BGH 20 Mar. 1961, *NJW* 1961, p. 1157 = BGHZ 34, p. 375 at 381; BGH, 8 Feb. 1965, *NJW* 1965, p. 962 at 963; for sec. 839a BGB, see MünchKommBGB/G. WAGNER sec. 839a BGB (n. 3), no. 18; Staudinger/M. WURM,



an opinion (*dolus directus*). It suffices, however, if the expert foresees the incorrectness of his opinion and proceeds accepting his liability tacitly (*dolus eventualis*).<sup>40</sup> As in practice, however, such intentional behaviour of the expert is rarely present and almost impossible to prove;<sup>41</sup> the second alternative of the provision, that is, liability for gross negligence, is of utmost importance. For this alternative, a line must be drawn between gross and slight negligence. In general, a person who fails to observe the ordinary care that is required in everyday life acts negligently.<sup>42</sup> Regarding experts, this standard translates to the relevant field of expertise;<sup>43</sup> that is, an expert who blatantly fails to observe the ordinary care that is required by a reputable expert in his discipline acts negligently. Moreover, this action must be grossly negligent, which is to say obviously substantially below the standard expected of an expert. He must have crossed the line between ‘this could happen’ to ‘this should by no means happen’.<sup>44</sup> This is, for example, the case when the expert clearly understood that he would not be capable of rendering a correct opinion on the topic due to his lack of competence or personal and technical means.<sup>45</sup> Additionally, any expert who renders an opinion without any visual inspection where such inspection is needed will act in a grossly negligent manner.<sup>46</sup>

If these conditions are fulfilled, the expert is liable to the party in the case for the damage resulting from the court order to the extent that this is based on the incorrect opinion. Two different types of damage may arise in this context:<sup>47</sup> damage directly connected to the court order (*Urteilsschäden*) corresponds in civil proceedings to damage resulting from the influence of the opinion on the disputed claim. Such *Urteilsschäden* are contrasted by damage that any party suffers due to a procedural error that had ultimately no impact on the final court

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sec. 839a BGB (n. 3), no. 11; C. THOLE (n. 3), 103; of different opinion E. DEUTSCH, ‘Privilegierte Haftung und Schadensfolge’, *NJW* 1966, p. 705 (connection to the harm as a signal to the potential tortfeasor).

40 See BGH (n. 23), p. 56; OLG Köln, BB (*Betriebsberater*) 1993, p. 891; OLG München, *VersR* (*Versicherungsrecht*) 1977, p. 482.

41 Apparently, this applies to only one case decided, OLG Köln, *VersR* 1994, p. 611 at 612 = BB 1993, p. 891.

42 BGH 11 May 1953, *BGHZ* 10, p. 14 at 16; BGH 17 Oct. 1966, *VersR* 1966, p. 1150; BGH 25 Jan. 1982, *NJW* 1982, p. 874.

43 MünchKommBGB/S. GRUNDMANN, sec. 276 BGB, 5th edn, Beck, München 2007, No. 105.

44 E. FREY, ‘Die Beschränkung der Schadensersatzpflicht des Arbeitnehmers’, *AuR* (*Arbeit und Recht*) 1953, p. 7 at 8.

45 For an example, see BGH 23 Feb. 1999, *NJW* 1999, p. 2736.

46 BT-Drucks. 11/4528, p. 175.

47 MünchKommBGB/G. WAGNER, sec. 839a BGB (n. 3), No. 24; C. THOLE (n. 3), p. 116; U. HOFFMANN, *Die Haftung des vom Gericht bestellten Sachverständigen*, Hoffmann, Marburg 1978, p. 32; K. PRANGE, *Materiell-rechtliche Sanktionen bei Verletzung der prozessualen Wahrheitspflicht durch Zeugen und Parteien*, Duncker & Humblot, Berlin 1995, pp. 16 *et seq.*



order (*Begleitschäden*). As section 839a BGB provides that only the former *Urteilsschäden* are compensable because only damage qualifying as ‘the result of a court decision based on [the] expert opinion’ is eligible for indemnification.<sup>48</sup> Potential damage entails any direct loss resulting from the court order, and all costs of the original and subsequent levels of legal action as those are directly related to its result and thus a ‘result of [the] court decision’.<sup>49</sup> The court order – necessary to determine such damage – is understood as the dictum of the legal consequence by the judge as the result of his assessment of the facts and the application of the objective law to these facts. Such court orders may appear as judgments, decisions, or executive orders (sec. 160, para. 3 *Zivilprozessordnung* (Code of Civil Procedure)).

Two limitations to such liability of the expert must, however, be duly observed. The first limiting restriction is already indirectly addressed in the above paragraph when stating that the damage must be consequential on the court’s order.<sup>50</sup> In other words, any liability of the expert is limited to the damage caused by the court order only. The expert opinion must be a condition of the harm sustained due to the judgment (the standard requirement that the plaintiff must demonstrate natural causation), and the expert opinion must qualify as an adequate cause of the harm sustained, which is the case when the opinion significantly increases the risk of an incorrect judgment and thus the harm that actually occurred. The second limitation results from reference to section 839, paragraph 3 BGB in section 839a, paragraph 2 BGB. The former provision stipulates that liability for damage does not arise if the injured person has intentionally or negligently failed to avert the damage by having recourse to appeal. Accordingly, any action against the expert will fail on these grounds; in this situation, a claim against the expert is not simply barred; it does not even come into existence.<sup>51</sup> This limitation is assisted by a wide understanding of potential judicial remedies by the injured as it is good law that those entail all potential actions against the breach of the official duties of the judge, including even formal and disciplinary complaints, indicative information, and inquiries.<sup>52</sup>

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48 MünchKommBGB/G. WAGNER, *sec. 839a BGB* (n. 3), No. 24; C. THOLE (n. 3), p. 116; K. PRANGE (n. 48), p. 16.

49 MünchKommBGB/G. WAGNER, *sec. 839a BGB* (n. 3), No. 24; Staudinger/M. WURM, *sec. 839a BGB* (n. 3), No. 7; C. THOLE (n. 3), p. 121.

50 BGH 9 Mar. 2006, *NJW* 2006, p. 1733; G. WAGNER & C. THOLE, ‘Die Haftung des Wertgutachters gegenüber dem Ersteigerer’, *VersR* 2004, p. 275 at 276; Staudinger/M. WURM, *sec. 839a BGB* (n. 3), No. 7, p. 17.

51 Thus, other forms of contributory negligence (see sec. 254 BGB) and any reduction of damages are dismissed in this regard.

52 BGH 29 Nov. 1954, *BGHZ* 15, p. 305 at 313 = *NJW* 1955, p. 297 at 298; BGH 9 Jul. 1958, *BGHZ* 28, p. 104 at 106 = *NJW* 1958, p. 1532; BGH 31 Mar. 1960, *NJW* 1960, p. 1718; BGH,

#### 4. Conclusions

From a comparative perspective, some distinct features of the German provisions on the liability of court-appointed experts should be (re-)emphasized. To begin with, German law provides for a clear rule on the liability of court-appointed experts in section 839a BGB as an action in tort. This rule draws from the previous works of German practice and literature and stipulates the liability of any appointed expert for damage resulting from the judgment to the extent that the latter relies on the erroneous opinion without any further distinction between civil or criminal proceedings. As the German procedural system is (generally) of an inquisitorial nature, that is, the judge is asked to establish the factual truth, the duty of care is owed to the court only, not to the parties in the case. The standard of care expected from the expert is that of ordinary care required by a reputable expert in his discipline. Only if he is intentionally or grossly negligent can any liability of the expert be established. If this is successful, damages entail compensation of the loss that results directly from the incorrect judgment; any secondary damage is disregarded. Finally, any liability is excluded if the injured party fails to avert the damage by having recourse to appeal.

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16 Jan. 1986, *VersR* 1986, p. 575; BGH 3 Jun. 1993, *BGHZ* 123, p. 1 at 7 = *NJW* 1993, p. 3061 at 3063; BGH 16 Nov. 2000, *NJW* 2001, p. 1067 at 1068; MünchKommBGB/H.-J. PAPIER, *sec. 839 BGB* (n. 17), No. 331 *et seq.*